BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High Speed	)	GN Docket No. 00-185
Access to the Internet Over	)	
Cable and Other Facilities	)	

COMMENTS OF
TEXAS OFFICE OF PUBLIC UTILITY COUNSEL

Rick Guzman
Texas Office of Public Utility Counsel
1701 N. Congress Avenue, Suite 9-180
Austin, TX 78701
(512) 936-7500 / (512) 936-7520 fax

December 1, 2000

TEXAS OPC COMMENTS, DECEMBER 1, 2000, FCC DOCKET NO. GN 00-185
TABLE OF CONTENTS

I. INTRODUCTION

A. INTEREST OF TEXAS OPC

The Texas Office of Public Utility Counsel (Texas OPC) is the state consumer agency designated by law to represent residential and small business consumer interests of Texas. Texas Utilities Code §§ 13.001-13.063. The agency represents over 8 million Texas residential customers and advocates consumer interests before Texas and Federal regulatory agencies as well as State and Federal courts.

B. OVERVIEW

Texas OPC respectfully submits these initial comments in response to the Federal Communications Commission (hereafter the FCC or the Commission) Notice of Inquiry in the Matter of High Speed Access to the Internet (hereafter NOI).[1] In these comments Texas OPC focuses on a few major legal and policy issues that will shape the development of regulations to govern the transmission of broadband Internet service over cable facilities. Specifically, Texas OPC submits:

> **The FCC must treat transmission of broadband Internet service over cable facilities as a telecommunications service and quickly commence rulemakings to implement nondiscriminatory interconnection for cable systems and to ensure that the underlying telecommunications services make an equitable and nondiscriminatory contribution to universal service.**

For the purposes of this comment, OPC assumes that the Commission will shoulder its responsibility under the statute. OPC may address arguments contrary to this view in reply comments. As will be clear from the following discussion, once these fundamental legal and

[1] In the Matter of Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185, September 28, 2000.

policy questions are answered properly, the bulk of the questions posed in the NOI are rendered irrelevant.

Assuming that the Commission classifies this service as a telecommunications service, it must begin to deal with the implications of such a policy. While open access remains the central issue, other issues do not, as a result, become less important. These other issues Texas OPC addresses in these comments are matters it deals with on a regular basis and which are less likely to be addressed by others. Specifically, these comments also address (1) forbearance, (2) state jurisdiction over telecommunications services, and (3) the role of these telecommunications services in supporting universal service.

II. REGULATING TELECOMMUNICATIONS SERVICES

A. THE TRANSMISSION OF INTERNET SIGNALS OVER CABLE MODEM FACILITIES IS A TELECOMMUNICATIONS SERVICE

The Notice of Inquiry comes several years after the Commission has been asked to directly address the regulatory classification and treatment of the transmission of broadband Internet service over cable networks.[2] Previously, the Commission has dealt with this issue in an *ad hoc* and intermittent manner, scattered across merger proceedings,[3] tangential

---

[2] The classification of this service has been on the public policy agenda of the FCC for perhaps too long of a time, as evidenced by the explicit request of Congress to have a report on the subject (see Federal Communications Commission, *In the Matter of Federal-State Joint Board on Universal Service: Report to Congress*, CC Docket No. 96-45, April 10, 1998). Specific requests for open access have been before the Commission in several proceedings including "Comments of Center for Media Education Office of Communications, Inc., United Church of Christ, the Civil Rights Forum, and Consumer Federation of America," *In the Matter Inquiry concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* CC Docket 98-146, September 17, 1998.

[3] The stunning inconsistency and technology bias resulting from an *ad hoc* policy can be seen in the diametrically opposed treatment of high speed Internet transmission in the approval of the AT&T mergers, in

inquiries,[4] staff documents not reviewed by the full Commission,[5] and speeches expressing the personal opinion of the Chairman[6] or the staff.[7] This approach has hindered the Commission's ability to develop expertise in this area or even to articulate a national public policy in a straightforward and comprehensibly fashion. As a consequence, the conflicting court record that the Commission cites in the introduction to the NOI is hardly surprising.[8] Lacking a definitive policy, some courts have been left scratching their heads trying to determine what this service is.

Although several cases have dealt tangentially with this service, in only one case was the legal question directly presented based on a complete record that took the matter up at

---

which no conditions were imposed, and the approval of the SBC-Ameritech and Bell Atlantic-GTE mergers, in which extensive conditions were imposed. The NOI cites the AT&T mergers in notes 7 and 13. The NOI makes no mention of the DSL conditions on the nearly simultaneous telephone company mergers. (see In re Applications of Ameritech Corp., Transferor, and SBC Communications INC., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, Memorandum Opinion And Order, Federal Communications Commission CC Docket No. 98-141, October 8, 1999; In re Applications of GTE Corporation, Transferor, and Bell Atlantic Corporation., Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion And Order, Federal Communications Commission CC Docket No. 98-184, June 16, 2000.

[4] The FCC relies most heavily on its Section 706 proceeding place in which it dealt with the legal and policy issues (see, for example, NOI notes 1, 4, 6, 8, 12, 13, 24).

[5] There are two major reports that the Commission identifies on its Web site. -- Esbin, Barbara, *Internet Over Cable: Defining the Future in Terms of the Past* (OPP Working Paper Series No. 30, 1998) and Oxman, Jason, "The FCC and the Unregulation of the Internet," (OPP Working Paper No. 31, July 1999).

[6] The nature of the *ad hoc* implementation of this policy can be gained from the fact that the OPP papers clearly state that they represent the personal opinions of the author, yet they turn up as justifications for policy. The Esbin paper is referred to in the NOI in note 14. The Oxman paper was given even greater prominence in a speech by Chairman Kennard, "The Unregulation of the Internet: Laying a Competitive Course for the Future," Remarks Before the Federal Communications Bar, Northern California Chapter, San Francisco, July 20, 1999, the day after it was released. Given this confusion between the personal position of the staff and commissioners on this subject and Commission policy, it is hardly surprising that the public and policymakers outside of Washington were led to believe that this was Commission policy, grounded on firm administrative procedure, which it was not.

[7] Lathan, Deborah, Chief of Cable Services Bureau, "Letter to the Editor of the New York Times," September 17, 1999.

[8] NOI, para. 13.

length.[9] The court in that proceeding, the 9th Circuit Appeals Court, having read the first brief directly on the matter prepared by the FCC, has come to a clear and precise conclusion, which was not challenged on appeal by any party. The Court concluded that to the extent that a cable operator provides "subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act." The FCC participated in that case. Texas OPC, therefore, submits that the Commission, as an amicus, remains bound to some degree by that finding under the principles of *res judicata* and *stare decisis*. Accordingly, Texas OPC submits the Commission should now classify and treat this service as a telecommunications service, consistent with the clear reasoning and ruling of the 9th Circuit Appeals Court.[10]

B. THE COMMISSION MUST REGULATE INTERNET ACCESS AS A TELECOMMUNICATIONS SERVICE

As the 9th Circuit Appeal Court pointed out, the statute mandates specific conditions in the provision of telecommunications services.

> Among its broad reforms, the Telecommunications Act of 1996 enacted a competitive principle embodied by the dual duties of nondiscrimination and interconnection. See 47 U.S.C. s. 201 (a) ...s. 251 (A) (1)... Together, these provisions mandate a network architecture that prioritizes consumer choice, demonstrated by vigorous competition among telecommunications carriers. As applied to the Internet, Portland calls it "open access," while AT&T dysphemizes it as "forced access." Under the Communications Act, this principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission such as telephone service and DSL, "regardless of the facilities used." The Internet's protocols themselves manifest a related principle called "end-to-end": control lies at the ends of the network where the users are, leaving a simple network that is neutral with respect to the data it transmits, like any common carrier. On this rule of the Internet, the codes of the legislator and the programmer agree.

---

[9] *AT&T Corp v. City of Portland,* 216 F.3d 871 (9th Cir. 2000).

[10] This recommendation responds to the questions asked in NOI paras. 15, 16, and 18.

The Commission's current policy of "vigilantly monitoring the rollout of broadband access"[11] has failed completely to produce the outcome required by law. Under the Communications Act, regulation of telecommunications services is not optional.[12] Currently, the provision of this telecommunications service by cable companies meets neither the nondiscrimination nor interconnection requirements of the Act and it has never done so. Not one unaffiliated ISP has been given actual access to the service on a nondiscriminatory basis.[13] The Commission has no basis to believe that this situation will change any time soon.[14] Allowing cable operators to pick and choose which unaffiliated ISP might get access at some future time under conditions that serve the interest of the network owner is the antithesis of the nondiscrimination obligation.

It is hard to imagine how the clear statement in the 9th Circuit decision of the duties for nondiscrimination and interconnection could be misinterpreted. Yet, the FCC has taken the court's statement that "this principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission such as telephone service and DSL, 'regardless of the facilities used'" and turned it on its head. It claims that "the court declined to say whether the Commission should subject the 'telecommunications service' provider to

[11] FCC website, *Broadband.* Elsewhere it calls it a "hands-off policy" (NOI, para. 4).

[12] Needless to say, this discussion rejects the notion expressed in the NOI in paras 32 and 41, that the Commission has discretion to choose whether or not to regulate this service or can choose a form of regulation without reference to other telecommunications carriers provide a similar service.

[13] The failure of a market-based approach to produce any non-discriminatory access whatsoever refutes the suggestion in para. 35 that the Commission can rely on a market-based approach to accomplish the goals of the Act.

[14] The situation is guaranteed to continue since exclusive contracts remain in force that directly contradict the mandate for nondiscrimination and interconnection. Concessions made for after the expiration of exclusive contracts do not constitute nondiscrimination. See "NorthNet Inc., An Open Access Business Model For Cable Systems: Promoting Competition And Preserving Internet Innovation On A Shared, Broadband Communications Network," Ex Parte filing, In the Matter of Application of America Online Inc. and Time Warner, Inc. for Transfers of Control, October 16, 2000 (hereafter NorthNet, Inc.).

the full range of telecommunications carrier regulation under Title II."[15] In fact, under the Commission's approach, none of the telecommunications carrier regulation under Title II applies to cable transmission of broadband Internet service. Failure to regulate in this instance ignores the fact that the FCC has repeatedly acknowledged the importance of broadband access to the nation's infrastructure, ignores the inherent advantage cable broadband access currently enjoys over DSL, and ignores the ability of internet subscribers to utilize internet access particularly through broadband as a substitute for some features of telephone service.

More importantly, the statute does not give the Commission discretion in the regulation of telecommunications services.

> Telecommunications Carrier – The term 'telecommunications carrier' means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage (emphasis added).

No one contends that cable companies are aggregators or are providers of fixed or mobile satellite services. Logically, the service falls within the definition of telecommunications service and should not be treated differently.

C. THE 9TH CIRCUIT RULING DIRECTLY ADDRESSES THE ISSUE AT HAND AND IS NOT INCONSISTENT WITH OTHER COURT RULINGS

The Commission should not be misled by attempts from others who cite the existence of contradictory court rulings as an excuse to ignore the 9th Circuit ruling. First, the Henrico

[15] NOI, para. 13. The FCC further appears to be attempting to establish requirements for the scope of court rulings before it fells compelled to comply by stating that "we note that the court reached this conclusion

County case is a lower court ruling, still on appeal.[16] Contrary to the FCC's claim that Henrico County found the service to be cable, it actually did not take a definitive position on this question. It identified a number of grounds on which the local cable franchising authority could not require open access. The dominant opinion (dominant in the sense that the court offered numerous grounds on which the local franchising authority was precluded from requiring open access) concluded that it might be a telecommunications service or it might be telecommunications functionality provided over cable service but in either case it is telecommunications and the local franchise authority cannot regulate it.

The 11th Circuit case[17] represents a different issue altogether, but one which also does not contradict the 9th Circuit. The 11th Circuit court ruling came in a pole attachment case in which the central issues of the NOI and the 9th Circuit case (nondiscrimination and interconnection) were tangential at best. The FCC filed for review at the Supreme Court on grounds that the 11th Circuit did not need to reach the statutory issue of defining the service. The question of treating the service as a telecommunications service was not raised on appeal and the court devoted only two paragraphs to the question of whether this is a telecommunications service.

The 11th Circuit, not dealing with the more fundamental issues, was asked to address the question of whether the Commission could regulate the pole attachment rates for information services. It tried to figure out how the FCC had dealt with cable operators in the past, but, since the FCC had proceeded on an *ad hoc basis,* it concluded by default that this service falls into a regulatory void. Ironically, the court concluded that only because the FCC

---

without specifically construing the language of the statutory definitions at issue."

[16] *MediaOne Group, Inc. v. County of Henrico,* 97 F.Supp.2d ___ (E.D. Va. 2000).

has not defined it as a telecommunications service, it would not. Of course, if the FCC does define it as a telecommunications service in accordance with the 9th Circuit, any appearance of conflict between the 9th Circuit and the 11th Circuit would be removed.

The 9th Circuit heard evidence directly on the important issues of discrimination and interconnection not only from the parties, but also from the FCC as *amicus.* Having been directly exposed to the FCC's *ad hoc* approach on the open access issue, the court relied primarily on the statute.

What the 11th Circuit could not address was the clear distinction between telecommunications services and information services that exists in the statute,[18] prior FCC rulings (the Computer Inquiries),[19] and the FCC's contemporaneous treatment of DSL service.[20] Internet services are information services under the Act. They are also enhanced services under the FCC Computer Inquiries. On the other hand, the transmission of Internet services is a telecommunications service under the Act. It is also a basic service under the FCC's Computer Inquiries. The new law and prior regulatory treatment are in perfect agreement. This is clear in the statute and clear in the FCC's Computer inquiries.

Whatever policy the FCC adopts must not disturb the a sharp distinction the Act maintains between telecommunications services on the one hand and information services on the other.[21]

> Telecommunications – The term telecommunications" means the transmission between or among points specified by the end user, of information of the user's

---

[17] *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000).
[18] As discussed above and noted by the 9th Circuit court.
[19] The NOI asks about this distinction in paras. 20 and 21.
[20] Also noted by the 9th Circuit.
[21] The NOI paras. 23 and 24 seek comment on this regulatory scheme.

> choosing, without change in the form or content of the information as sent and received.
>
> Telecommunications Equipment – The term telecommunications equipment means equipment, other than customer premise equipment, used by a carrier to provide telecommunications services and includes software integral to such equipment (including upgrades).
>
> Telecommunications service – The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.
>
> Information service – The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management control, or operation of a telecommunications system of the management of a telecommunications service.[22]

The 9th Circuit ruling applied a functional approach to the open access issue and even extended the Act's embedded dichotomy between information and transmission over to the Internet issue, leaving no doubt that the decades old categorization used by the FCC and the definitional scheme of the 1996 Act are more than adequate for the current telecommunications environment.

> Under the statue, Internet access for most users consists of two separate services. A conventional dial-up ISP provides its subscriber access to the Internet at a "point of presence" assigned a unique Internet address, to which the subscribers connect through telephone lines. The telephone service linking the user and the ISP is classic "telecommunications," which the Communications Act defines as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or the content of the information as sent and received." A provider of telecommunications services is a "telecommunications carrier," which the Act treats as a common carrier to the extent that it provides telecommunications to the public, "regardless of the facilities used..."

[22] Section 3, Definitions.

> ISPs are themselves users of telecommunications when they lease lines to transport data on their own networks and beyond on the Internet backbone. However, in relation to their subscribers, who are the "public" in terms of the statutory definition of telecommunications service, they provide "information services," and therefore are not subject to regulation as telecommunications carriers...
>
> Like other ISPs, @Home consists of two elements: a pipeline (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are one of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.

The statute, prior FCC practice and the 9th Circuit ruling are based on a straightforward, common sense set of definitions. Equipment is used to transmit information between points specified by the user. If such a service is offered to the public or a class of users (such as ISPs), which has the effect of offering the service to the public, it is a telecommunications service. Sharp regulatory distinctions are made between information and its transmission in order to provide a wide margin of regulatory room for information services, which implicate critical constitutional issues. Federal broadband access policy should continue this approach. The information itself, and the business of creating it, are information services, but the transmission is telecommunications. Any other approach concerning broadband access runs the risk of blurring the distinction between information services and telecommunications services.

III. FORBEARANCE BY DEFAULT

A. THE COMMISSION HAS NOT EXERCISED ITS FORBEARANCE AUTHORITY UNDER THE ACT WITH REGARD TO TRANMISSION OF BROADBAND INTERNET SERVICE

Having ignored the clarity of the 9th Circuit ruling with respect to telecommunications regulation under Title II, the NOI then misstates its authority to forbear. The NOI claims that the 9th Circuit observed, with respect to Title II, "that the Commission has broad authority to forbear from enforcing those regulations."

What the 9th Circuit simply did was note that the forbearance authority exists under the statute. It certainly did not excuse the Commission from exercising that authority in a legal and responsible manner. Indeed, the court noted that forbearance is conditional upon specific findings and conditions. The Commission's forbearance authority is not as broad as the Commission claims and it must be exercised dutifully as an authority, not conjured up on an *ad hoc* basis.

The Commission cannot take a "hands-off" policy without a formal proceeding.[23] The language of the statute is clear on this.

> SEC. 10. (a) Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that –
>
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision or regulation is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

[23] The Commission characterizes its policy as hands-off in NOI, para. 4. The FCC's broadband web site links this expression to one of its working papers dealing with the "unregulation" of the Internet.

If the Commission now asserts, after the fact, that it has acted, over the past two years, under its forbearance authority, it is clearly in violation of the law. No such determinations were made in any prior proceeding, we know of, that gave proper notice and was conducted in accordance with proper administrative procedure. This NOI certainly does not constitute such a proceeding for a host of reasons.

B. THE COMMISSION SHOULD NOT FORBEAR FROM REGULATING TRANSMISSION OF BROADBAND INTERNET SERVICE

Moreover, if the Commission were to conduct a forbearance proceeding, it would find that it could not forebear, since the broadband Internet access market does not meet the criteria laid down in the Act for forbearance. We doubt whether the Commission could find even one of these conditions, not to mention all three, that are required to permit forbearance.

The Commission has before it, in each of the proceedings it claims has informed the NOI, clear and specific evidence and complaints of gross discrimination against unaffiliated ISPs.[24] It has clear and specific complaints from representatives of consumers of the failure of consumer protection and abuse of consumers.[25] It cannot ignore the simple fact that no unaffiliated ISP has been able to provide service to the public on a nondiscriminatory and

[24] For example, see NorthNet, Inc.

[25] Several consumer groups with which Texas OPC has frequently joined in intervening at the Commission, e.g. the Consumer Federation of America and Consumers Union, have filed in these matters. See Consumers Union, Consumer Federation of America and Media Access Project, *Breaking the Rules: AT&T's Attempt to Buy a National Monopoly in Cable TV and Broadband Internet Services* (August 17, 1999); Petition to Deny of Consumer's Union, Consumer Federation of America, Media Access Project, and Center for Media Education, In the Matter of Application of America Online Inc. and Time Warner, Inc. for Transfers of Control, April 26, 2000; Testimony of Dr. Mark N. Cooper, Director of Research, Consumer Federation of America, on behalf of Consumer's Union, Consumer Federation of America, Media Access Project, and Center for Media Education, *En Banc Hearing*, In the Matter of Application of America Online Inc. and Time Warner, Inc. for Transfers of Control, July 27, 2000.

commercial basis using the transmission service for Broadband Internet service over any cable system.[26]

[26] AT&T, the first entity to commit to providing voluntary open access (as cited in the NOI, para.) is just now starting a technical trial of interconnection. Its public statements indicate it will not comply with the nondiscrimination requirement. A recent account of its trial indicates how little progress has been made (see Goodman, Peter S., "AT&T Puts Open Access to a Test," *Washington Post,* November 23, 2000:

> But as a demonstration of the software last week made clear, AT&T's logo will remain an immutable part of every screen, flanked by menus that beckon customers with links to web sites for local news and shopping – AT&T's commercial partners, who will share revenues.
> "We are not going to become invisible," said Susan K. Marshall, senior vice president of data services at AT&T Broadband, who is overseeing the Boulder trial. "To get to the Internet, you have to do something with that globe. It puts the brand in the customer's mind... so that I have the ability to drive some additional revenues.
> But some ISPs say AT&T's digitally engraved logo and unwillingness to fully relinquish the customer's first screen undermines its commitment to open access.
> "This whole test in not about interoperability," said Douglas H. Hanson, chief executive of RMI.net Inc., a Denver-based ISP that is participating in the trial. "It's about, 'How can we put up a smoke screen to satisfy the regulators to prevent regulation of cable access.'"
> Founder Joe Pezzillo worries that the competitive gap could widen as broadband brings new business models.
> He envisions AT&T making deals with major music labels to deliver its own Internet radio, with AT&T providing the fastest connections to its partners and slower connections to sites like his.
> "Someone is not going to wait for our page to load when they can get a competitor's page instantly," Pezzillo said.
> AT&T says it has yet to formulate business models with partners, but the software the company has designed for the Boulder trial – demonstrated at its headquarters in Englewood, Colo., last week – clearly includes a menu that will allow customers to link directly to its partners. Company officials acknowledge that AT&T's network already has the ability to prioritize the flow of traffic just as Pezzillo fears.
> "We could turn the switches in a matter of days to be able to accommodate that kind of environment," said Patrick McGrew, an AT&T manager working on the technical details of the Boulder trial.
> Though the Boulder trial is focused on technical issues alone, AT&T will study the way customers navigate the system as it negotiates with ISPs seeking to use its network....
> AT&T has also designed its own Web browser that will pop up when customers click on the "Internet" window.
> Those savvy enough to navigate the system without instructions will be able to use familiar browsers such as Microsoft's Internet Explorer or Netscape. But AT&T's software will encourage customers to use its browser.
> The reason for this subtle positioning is the value of owning the first screen....
> Thus, if AT&T's flashing logo and its browser become – as the company hopes – vehicles to lure customers to sites run by its partners, the dollars it collects will come at the expense of ISPs that otherwise would have claimed the revenue.

Certainly, these practices violate the principles of nondiscrimination that have been applied to other telecommunications service. It is simply impossible to square any of these business practices with the nondiscrimination requirements that the Commission has imposed on DSL service under the Act.

The fact that some ISP might or might not get nondiscriminatory access at some time in the future, if some company decides to do it, is not a justification under the Act for forbearance. The fact is that the Commission has not conducted a forbearance proceeding to support its "hands-off" policy.

C. FORBEARANCE WOULD BE INCONSISTENT WITH OTHER POLICIES BEING PURSUED BY THE COMMISSION

The Commission will also find it extremely difficult to justify forbearing from regulating the transmission of broadband Internet service over cable modem facilities in the context of other obligations under the Act. The technology neutrality principles that the Act supports and the Commission claims to promote have been thoroughly undermined by the Commission's *ad hoc* forbearance policy applied to transmission of broadband Internet service over cable facilities.

The Commission's web site on broadband presents the following facts:

- Cable modem service is the dominant transmission mechanism for broadband Internet service.[27]
- Cable is dominant in market share in a distinct market for Internet transmission service.[28]
- Cable is the preferred technology for high-speed video services. DSL suffers from significant restrictions in availability in rural areas.
- The Commission, however, has declined to require nondiscriminatory access to cable facilities for the transmission of broadband Internet service.[29]

[27] The first reference on the web site is to the most recent Advanced Services report.

- The Commission has imposed extensive nondiscrimination requirements on telephone companies for DSL service including actions such as "Line Sharing" to Lower Cost and Increase Availability of Broadband Services Used for High Speed Access to the Internet.[30]

In summary, the nondominant, inferior, less ubiquitous technology is the more heavily regulated, while the Commission forbears from regulating the dominant, superior more ubiquitous technology. At a minimum, the Commission would appear to have it backwards. One would think that the Commission should be forbearing from regulating the other technology. The Act supports technological neutrality and draws regulatory distinctions based on functionality, as is common with most forms of telecommunications regulation. This approach preserves federal policy in light of a rapidly changing technological environment. The FCC's *ad hoc* approach turns this relationship on its head by deriving policy based on technological differences and ignoring the functional similarities. In fact, the Commission should not forbear from regulating. First, the Commission's authority to forbear on a technology-by-technology basis, except where explicitly granted by the Act, is doubtful. There is nothing in the statute or legislative history to support the Commission's belief that it can selectively forbear from regulating specific technologies, as opposed to specific services. Quite the contrary is the case. By including the term "regardless of the facilities used" the Congress seems to have indicated it does not want the world regulated by technologies.

---

[28] The NOI (para. 12) notes the decision of the Department of Justice to require AT&T to divest its interest in RoadRunner, a requirement that rests on the finding that Broadband Internet service is a distinct market from narrowband.

[29] Lathan, at Note 7.

[30] Dated November 19, 1999.

Second, the standards for forbearance, particularly with respect to nondiscrimination and interconnection, should be rigorously interpreted. The Commission's suggests that the existence or potential existence of an alternative facility alone is sufficient to forbear from regulating.[31]

Imagine the disaster that would befall consumers if this remarkably weak standard were applied to other telecommunications services? This is not an adequate standard of competition as a basis for forbearance by any stretch of the imagination. Two or three competitors in any given market is not generally considered to produce vigorously competitive markets so as to justify forbearance. The Department of Justice, for example, requires the equivalent of six equal sized competitors before it defines a market as not highly concentrated.[32] It requires the equivalent of ten or more equal sized competitors to find a market is not moderately concentrated. High-speed Internet telecommunications facilities markets are nowhere near this level of competition.

IV. JOINT STATE/FEDERAL JURISDICTION OVER TELECOMMUNICATIONS SERVICES

A. AS A TELECOMMUNICATIONS SERVICE, TRANSMISSION OF BROADBAND INTERNET SERVICE IS SUBJECT TO JOINT STATE/FEDERAL JURISDICTION

When broadband Internet Access service is defined as a telecommunications service, it becomes subject to the scheme of joint state/federal regulation of such services. Although the cable companies are likely to complain about conflicting or overlapping regulation as loudly

[31] NOI, para. 42 asks, "Specifically should the Commission intervene if a cable operator is the only facitlies-based provider of high-speed services and it owns or control the ISP providing service to end users. Should the Commission intervene if there is an actual or potential competitor to the cable operator?"

[32] U.S. Department of Justice, *Merger Guidelines,* April 8, 1997.

as other telecommunications common carriers do, Texas OPC believes state jurisdiction plays a vital part in promoting the public interest and is essential in reaching the goals of the 1996 Act. The authors of the Communications Act certainly suggested this is the case. They preserved a clear role for state authority under both Title VI (Cable Communications) and Title II (Common Carriers) of the Act.

In its *amicus* brief in the Henrico case, the Commission cites Section 541 (b) 2)(D) of the Act, which states that "a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal or a transfer of a franchise." The Commission invokes this section of the Act well over a dozen times.[33]

Two paragraphs down the page, however, we find Section 541(d) (2) of the Act. This section explicitly preserves the right of the states to regulate non-cable services provided by cable companies, regardless of whether they are provided on a common carriage or private carriage basis.

> Sec. 541 (d) (2) Nothing in this title shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communications service other than cable service, whether offered on a common or private carriage basis.

The authors of 1996 Act also preserved and refined the long-standing practice of joint federal and state regulatory oversight over telecommunications services under Title II of the Act. In at least three areas that are directly relevant to the transmission of broadband Internet service the states continue to play a key role.

[33] FCC Amicus Curiae Brief, MediaOne Group, Inc. v. County of Henrico, 97 F.Supp.2d ___ (E.D. Va. 2000).

The states have a prominent role in consumer protection. The states play a prominent role in administering universal service policy, implementing many important aspects of federal policy and adding a layer of state policy. The 1996 Act expressly reserves state authority in these areas.

> Sec. 253 (b) State Regulatory Authority – Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> Section 254(i) establishes joint responsibility for consumer protection.

It is entirely appropriate that as these issues affect the transmission of broadband Internet access as a telecommunications service, they be incorporated into the existing regulatory framework for telecommunications services. It would further the goals of ensuring competitive neutrality between technologies in providing advanced services.

B. STATE OVERSIGHT OF NONDISCRIMINATORY INTERCONNECTION

The states also play a role in nondiscriminatory interconnection. For the vast majority of telecommunications service provided in the nation, states were made the front line agencies for implementation of interconnection between incumbent firms and competitive entrants. Notably, states are the front line for ensuring non-discriminatory access to DSL services. They set tariffs, ensure access to operating support systems and arbitrate disputes.

The Commission asks a series of questions about how to administer a regime of open access.[34] The simple fact of the matter is that there is already a structure in place. Sections 251 and 271 of the Act have established a rigorous set of procedures to implement the

[34] NOI, paras. 47-48,

nondiscrimination and interconnection provisions of the Act. DSL has been subject to this regulatory regime.

As the Commission is well aware, the states play a central role in the process. In Texas, the dominant local exchange company, under the close scrutiny of the Texas Public Utility Commission is the only one in the nation to have enjoyed the support of the public utility commission, the Department of Justice, and the FCC in its entry into the long distance market. Texas OPC participated vigorously in that process. Texas OPC believes that the Commission could easily and quickly embed the administration of open access for transmission of broadband Internet service over cable facilities into that structure. This would allow it to move quickly and would treat the two technologies similarly.

C. EVEN IF THE FCC WERE TO FORBEAR FROM REGULATING ASPECTS OF BROADBAND INTERNET ACCESS AS A TELECOMMUNICATIONS SERVICE, THE STATES COULD STILL EXERCISE JURISDICTION OVER OTHER ASPECTS OF THE TRANSMISSION OF BROADBAND INTERNET SERVICE

While the 1996 Act did grant the FCC the authority to forbear from regulating telecommunications services, it was very precise in its wording about the specificity with which this forbearance would be exercised not only with respect to the services but also with respect to the preemption of state regulation. Such preemption is specifically restricted to state regulation of telecommunications services authorized by the Communications Act.

> Sec. 10 (e) *STATE ENFORCEMENT AFTER COMMISSION FORBEARANCE.* –
>
> A state commission may not continue to apply or enforce any provision of this Act that the Commission has determined for forbear from applying under subsection (a).

By framing the preemption in this way, the Act implicitly leaves the door ajar to state regulation of other aspects of the service under state law. In fact, the conference report explicitly opens that door.

> New subsection (e) provides that a State may not continue to apply or enforce any provision of the Communications Act that the Commission has determined to forbear from applying under new subsection (a). This new subsection is not intended to limit or preempt State enforcement of State statutes or regulations.[35]

V. UNIVERSAL SERVICE

Section 254 of the 1996 Act seeks to promote the universal availability and affordability of telecommunications services, with a particular emphasis on advanced services. Sections 254 (b)(2), (3), and (6) each target the deployment of advanced services.

> Moreover, the Act explicitly requires that
>
> Sec. 254(b)(4) Equitable and Nondiscriminatory Contributions: All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service. (Emphasis added).

The states have a clear role in this universal service process. Section 254(a) establishes a joint board. Section 254 (f) preserves state authority to "adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service." Critical to that role is the reasonable requirement that all telecommunications carriers contribute to both intrastate and interstate support. It is evident that cable networks will be the dominant means of transmitting broadband Internet service and they already have a very substantial market.

---

[35] Conference Report, p. 185.

Consider the following example. Based on the most recent announcements of Excite@Home, assume that it has 2.3 million subscribers. Assume that the transmission service bundled in its offering is valued at the price of DSL transmission service of about $10 per month. By these calculations, AT&T, as the cable owner and transmission service provider is generating more revenue from the telecommunications traffic it carriers for Excite@Home than about one-third the telecommunications common carriers subject to Commission authority.[36] AT&T can and should make a contribution to universal service.[37]

VI. CONCLUSION

The Communications Act, as amended by the 1996 Act, adopts a common sense distinction between the transmission of information and the information itself that is perfectly reasonable and understandable. The Commission used this approach for several decades prior to the passage of the 1996 Act and applied it to DSL service after the passage of the Act. This distinction should be continued now with cable access issues.

The 9th Circuit heard evidence on the nature of transmission of broadband Internet service over cable modem facilities and concluded that this service fits the statutory definition of a telecommunications service precisely. Its decision is clear and straightforward. The FCC labors mightily to read ambiguity into that decision, to create obligations for the court to be more specific in its direction to the agency before it will obey its rulings, or to stretch the rulings of other courts in a futile claim of judicial contradiction.

[36] Federal Communications Commission, *Statistics of Common Carriers,* 1999/2000, Table 1.2.

While the FCC scratches its head, the cable industry aggressively exploits the abdication of authority. The exclusive contracts are still in place and cable companies explicitly refuse to provide interconnection, thereby failing to fulfill their obligations as telecommunications carriers under the Act. At the same time, at least some in the industry have refused to pay franchise fees to local cable franchising authorities, claiming that these local authorities are not allowed to collect such fees on telecommunications services.[38] Everyone, the courts, consumers, competitors, even the cable TV industry seems to recognize this is a telecommunications service.

The FCC's *ad hoc* approach has created a regulatory void that puts a lot more at risk than just the franchise fees, it threatens to undermine the fundamental distinctions made in the Communications Act. Texas OPC urges the Commission to Act quickly to fill this void by proposing rules for nondiscrimination and interconnection under sections 201, 202, 203 and 251 of the Act and for equitable and nondiscriminatory contributions to universal service under section 254 of the Act. In so doing, it should also recognize the important role that states can play in ensuring nondiscriminatory interconnection, consumer protection and universal service—a role that is deeply embedded and clearly outlined in the joint federal/state jurisdictional approach taken in the Communications Act.

---

[37] This recommendation responds to NOI para. 20.

[38] A recent full page advertisement sponsored in part by the California Cable TV Association (November 28, 20000, p. 12A) declares,

> It's not your parents' cable industry anymore. Through a combination of factors – opportunities of circumstance, competition and the advent of the Internet – the cable industry has been transformed from a simple provider of retransmitted television pictures into a cutting-edge broadband telecommunications industry.

Dated: December 1, 2000

Respectfully submitted,

Suzi Ray McClellan
Public Counsel
State Bar No. 16607620

/s/ Rick Guzman
Rick Guzman
Assistant Public Counsel
State Bar No. 08654670

OFFICE OF PUBLIC UTILITY COUNSEL
1701 N. Congress Avenue, 9-180
P.O. Box 12397
Austin, Texas 78711-2397
512/936-7500
512/936-7520 (Facsimile)
guzman@opc.state.tx.us